IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

ARBITRATION PETITION NO.143 OF 2007

Kavis Fashions Pvt.Ltd. Petitioners
vs.
M/s.Dimple Enterprises & ors. Respondents

Mr.E.P. Bharucha, Sr.Counsel with Mr.P.S.Colabawala i/b.M/s.Maneksha Sethna for the petitioners.

Mr.Pravin Samdani i/b.M/s.B.R.Zaveri for the respondents.

CORAM : ANOOP V. MOHTA,J.

DRESERVED ON: 21st April, 2007

PRONOUNCED ON: 27th April, 2007

P.C.

This is a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (for short, "Arbitration Act"), based on the agreement for arbitration between the petitioner and the respondents.

2. The petitioner is a Private Limited Company and carry on the business of manufacturer of leather footwear and exports. Respondent no.1 is a partnership firm carrying on business of development of real estate etc. Respondents 2 to 3 are the partners of respondent no.1 firm.

3. By a Memorandum of Understanding (MOU) dated 31.8.2006, the respondents agreed to sell an industrial

building to be constructed by them as per the petitioners requirement on a plot of land bearing CTS No.710 (F), admeasuring approximately 2087.20 square metres situated at Village Marol, Andheri, together with an assignment in respect of the leasehold interest in the said land (the said premises) for a lump sum consideration of Rs.14,75,00,000/- . The petitioners have paid a security deposit of Rs.2,00,00,000/-. The relevant portions of Clauses 8, 9 and 18 read thus:

> "8. The Purchaser has agreed to pay the said agreed lump sum consideration of Rs.14,75,00,000/- in the following manner.
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> i. Rs.2,00,00,000/- (Rupees Two Crores only) on or before execution of these presents the developer doth hereby admit and acknowledge the receipt of the said amount. It is agreed and understood till the agreement for sale/assignment is made as contemplated and provided hereunder, the said amount of Rs.2,00,00,000/- (Rupees Two Crores only) shall constitute a security deposit paid by the purchaser to the developer and on execution of the said agreement, the said sum of Rs.2,00,00,000/- (Rupees Two Crores only) shall constitute and be available for appropriation towards the part consideration.
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> ii. Rs.4,00,00,000/- (Rupees Four Crores only) on execution of the Agreement for sale of the industrial building proposed to be constructed on the said plot together with agreement of assignment in respect of the entire rights, title and interests of the said plot of land at par with that of the Developers more particularly described in the Second Schedule hereunder written.

9. It is specifically agreed and understood that the agreement for sale of the industrial building proposed to be constructed on the said plot of land together with agreement of assignment of the rights, title and interests of the said leasehold plot shall be made and executed on the developers complying/ fulfilling the following requirements:

a. The developers shall make out a marketable title in respect to the said plot free from any kind of encumbrance, litigation, charge and a lien and to that effect the developer shall furnish a title clearance certificate of their solicitors/advocate certifying that the developers right to develop the said plot and sale the said proposed building to be constructed on the said plot together with assignment of the entire rights of the said plot.

b. The developers shall obtain commencement certificate.

18. The Developers shall make out clear and marketable title in respect of the plot of land more particularly described in the Second Schedule hereunder written, within 30 days from the date of, otherwise the Purchaser shall be entitled to rescind this MOU and in that event, the Developer shall be liable to refund the said amount of Rs.2,00,00,000 (Rupees Two Crores only) immediately and forthwith. In the event of delay on the part of the developers in refund of the said amount of Rs.2,00,00,000 (Rupees two Crores only), immediately, then the developers shall be liable to pay interest @ 12% p.a. till payment thereof....."

4. The petitioners received a certificate dated 8.8.2006 of Kirit N. Damania & Co., Advocates and Solicitors of Respondents. However, the respondents failed to make out marketable title as contemplated in the MOU.

5. The petitioners by their electronic mail (e-mail) dated 19.8.2006 requested the respondents to satisfy the petitioners as to the title of the said land as set out therein.

6. On 27.8.2006 the plans prepared by the respondents for the construction of the said building were received by the petitioners and after inspection the same were approved by the petitioners on or about 5th October, 2006.

7. The petitioner by its e-mail dated 5.10.2006 requested the respondents to carry out certain modifications and revised the plan. There is no reply from the respondents.

8. On 11.12.2006 the respondents through their partners Mr.Kishore Raheja, Mr.Nikhil Raheja and Mr.Rajesh Patel the representative of the Respondents informed the petitioners that the Respondents wished to unilaterally terminate the agreement without giving any reasons for the same.

9. On 19/21.1.2007 the respondents contended that the MOU had come to an end and inter alia were entitled to initiate development of the said plot without any

reference to the petitioners.

10. The petitioners by their advocates letter dated 13.2.2006 in reply to the above called upon the respondents to withdraw its letters. Petitioners whilst rejecting the alleged termination interalia called upon the respondents to comply with the terms and conditions and their obligations under the said MOU.

11. On 27.2.2007 respondents by their advocate's letter sought to make various false allegations against the petitioners. In the said reply the respondents have for the first time stated that after the execution of the MOU dated 31st August 2006 the owners/lessors of the said land through their solicitors had issued a notice dated 15th September, 2006 to the lessees and purportedly terminated the lease in respect of the said land. It is falsely stated in the said letter that the respondents had handed over a copy of the said notice and the reply thereto by the respondents advocate to the petitioners. The same have not been furnished to the petitioners till date.

12. On 28.3.2007 the petitioners have invoked Arbitration proceedings as per the terms of the MOU dated 31st August, 2006 by their Arbitration Notice. The petitioners state that the respondents are likely to

enter into an agreement for the development of the said land with third parties without any reference to the petitioners. The petitioners apprehend that alternatively respondents in order to defeat the claim of the petitioners may enter into a settlement with the owner/lessor and handover possession of said land to them or to third parties.

13. The material available on record shows that the MOU in question was not a final agreement. The marketable sale was based on various compliances/obligations within a specified period. By this MOU, the parties had agreed to develop and sell the industrial building to be constructed on the plot of land bearing CTS No.710 together with an assignment in respect of the said land for the lump sum consideration and upon the terms and conditions as referred above. As per the terms and conditions admittedly, the petitioners had paid Rs.2 crores on the execution of the said MOU as a security deposit. As agreed, the balance consideration supposed to be made on the happening of various events and the obligations which need to be complied with by the respondents. The next instalment of Rs.4 crores was to be paid on execution of a formal agreement for sale. Admittedly, the respondents were under obligation to make out a marketable title in respect of the said land free from encumbrances, litigation, charges and

furnishing the title clearance certificate of a Solicitor. The respondents therefore sent a certificate dated 8th September 2006. The petitioners requested for certain details of the said land as to verify the title. The respondents, as alleged, never responded the said e-mails. The obligations to issue a certificate of marketable title was not complied with.

14. As correspondence shows that some time in November and December, 2006 the parties, after due discussion and meetings, decided to terminate the said MOU and, accordingly, returned the sum of Rs.2 crores by letter dated 19.1.2007. The petitioners, however, resisted the same and refused to accept the said amount.

15. On 27.1.2007, therefore, the respondents informed the petitioners to collect the cheque in the sum of Rs.2 crores on any working day. The said amount is still lying with the respondents.

16. By notice dated 3.2.2007, the petitioners objected to the said unilaterally termination of the MOU and requested to withdraw the action of termination of contract and further requested to comply with the said terms and conditions.

17. The respondents by letter dated 28.2.2007 informed

again to the petitioners' Advocate and re-iterated their stand of termination of the MOU basically on the ground that after execution of the MOU the owner/lessor of plot of the land, through their Solicitors issued the noticed dated 15.9.2006 to the lessee and the developers and terminated the lease deed. Respondents resisted the said again by its reply dated 30.9.2006. In pursuance to that personal meetings were held from October to December, 2006 and in fact handed over the copy of the said notice dated 15.9.2006 and the respondents reply dated 30.9.2006 to the petitioners. Thereafter the petitioners themselves agreed to put an end to the said MOU in question. Based on which the respondents have returned the said amount. However, the petitioners are now refusing to accept the same and insisting for performance of contract based on the said MOU.

18. Admittedly, the petitioners based on this notice dated 28.2.2007 issued a notice dated 28.3.2007 to the respondents and resisted the case of the respondents. The fact that the meetings were held in November/December 2006 is not denied by the petitioners as reflected in the letter.

19. The respondents have no marketable title in the said land. The petitioners, therefore, by this notice dated 28.3.2007 again requested to comply with the

obligations under MOU.

20. The petitioners have already invoked the arbitration clause, pending the constitution of the Arbitral Tribunal in the above facts and circumstances, as admittedly the respondents failed to comply with the obligations and basically in view of the termination of the lease itself of the land upon which the parties had agreed to develop the industrial building. This facet, according to me, is very relevant to decide the present petition. Prima facie, as referred, the MOU stands terminated. There was no agreement to sale executed. The respondents have returned the money, though refused to accept by the petitioners. The decision if illegal termination and the consequences of the same need detailed evidence and material. Prima facie, in view of the non-compliance of the obligation by the respondents as they have no right to continue with the lease of the land in question and as they failed to make out a marketable title as agreed, a case for the specific performance based on the MOU, at this stage, cannot be considered to be in favour of only interim relief.

21. It is settled law that jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The specific performance will not be ordered if the contract

itself suffers from some defect which makes the contract invalid or unenforceable. "The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract." **(1990) 3 SCC 1-Mayawanti vs. Kaushlyadevi)** In the present case, unless evidence is led by the parties on either side, in view of the above findings the MOU in question is not enforceable. I am acceding to the submission raised by the learned counsel for the respondents that there is no case made out for any discretionary and equitable relief as prayed by the petitioners.

22. One more facet which cannot be overlooked in the matter is that as the primary obligation of respondents become impossible, the petitioners, unless decided finally, at this stage, cannot bound the respondents to perform his part of the obligation based on the MOU in question. The fact of termination of the MOU and return of the said earnest money though refused to accept by the petitioners, is very material. It is difficult to accede to the submission raised by the learned counsel for the petitioners that as per the MOU, the purchaser/respondents only could have terminated or relinquished agreement and not by the respondents. The case of respondents as referred above is, apart from

inability in view of the termination of the lease of land in question, the respondents themselves agreed to relinquish the MOU in the meetings held during the period from October to December, 2006 cannot be overlooked.

23. Taking all this into account, keeping all points open, I am not inclined to grant any interim relief as prayed in this application under Section 9 of Arbitration Act. The petitioners are at liberty to apply before the Arbitral Tribunal, if constituted, for appropriate relief.

24. The petition is therefore dismissed. No costs.

[ANOOP V. MOHTA,J.]